

The logo for the New York City Bar, featuring the text "NEW YORK CITY BAR" in a bold, serif font, centered between two horizontal blue bars.

NEW YORK
CITY BAR

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February 2, 2015

By Facsimile and Email

H.E. Dr.Nkosazana Dlamini Zuma
Chairperson of the African Union Commission
P.O. Box 3243
Roosevelt Street (Old Airport Area)
W21K19
Addis Ababa, Ethiopia

Your Excellency:

I write on behalf of the Association of the Bar of the City of New York (“the Association”) to express our grave concern over the inclusion of immunity for serving African Union heads of state (and certain similarly placed other people) in the Amendments to the Protocol on the Statute of the African Court on Human and Peoples’ Rights (“ACHPR”) (“Amendments Protocol”). We urge the African Union (“AU”) and African states to remove this provision from the Amendments Protocol in order to prevent impunity for the serious crimes proscribed therein.

The Association is an independent non-governmental organization with more than 24,000 members in over 50 countries. Founded in 1870, the Association has a long history of dedication to human rights, notably through its Committee on International Human Rights, which investigates and reports on human rights conditions around the world, and the Committee on African Affairs, which closely monitors and responds to legal developments in Africa. In addition, The Cyrus R. Vance Center for International Justice advances global justice by engaging lawyers across borders to support civil society and an ethically active legal profession.

Since 2008, the African Union has pursued a merger of the African Court of Human and Peoples’ Rights and the proposed African Court of Justice. The resulting body would be an African Court of Justice and Human and Peoples’ Rights (“ACJHPR”).¹ In early 2009, the AU Assembly of Heads of State and Government

¹ Article 8 of the Amendment Protocol states, “African Court of Justice and Human Rights” is deleted and replaced with “African Court of Justice and Human and Peoples’ Rights.” However, the Registrar advised

(“AU Assembly”) began considering the possibility of expanding the proposed ACHPR to include a chamber with the power to assert penal jurisdiction over international crimes. In 2011, a largely complete draft report and statute were provisionally adopted. In 2012, a Draft Protocol on Amendments to the Protocol on the Statute of the ACHPR was nearly finalized. In May 2014, the AU Special Technical Committee on Justice & Legal Affairs adopted the Draft Protocol.

The provisions granting head of state immunity were not included in the Draft Protocol until July 2014. That month, at the 23rd Ordinary Session of the Summit of the African Union held in Equatorial Guinea, a Protocol on Amendments to the Protocol on the Statute of the ACHPR was adopted. It included an amendment – Article 46A *bis*, which reads:

No charges shall be commenced or continued before the Court against any serving African Union Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office.

The Association opposes the inclusion of immunity for heads of state and similarly placed people in the Amendments Protocol. At a legal level, the amendment contravenes the consistent trend in international law against head of state immunity. Immunity based on official capacity is expressly prohibited in the Convention on the Prevention and Punishment of the Crime of Genocide,² the Charter of the International Military Tribunal at Nuremberg,³ the Charter of the International Military Tribunal for the Far East,⁴ the Statute of the International Criminal Tribunal for the former Yugoslavia,⁵ the Statute of the International Criminal Tribunal for Rwanda (“ICTR”),⁶ the Rome Statute of the International Criminal Court (“ICC”),⁷ the Statute of the Special Court for Sierra Leone (“SCSL”),⁸ the Law on the Establishment of the Extraordinary Chambers in the Court of Cambodia,⁹ and the Statute of the Extraordinary African Chambers in the courts of Senegal.¹⁰

Sitting heads of state have been indicted while still in office. The ICC

that the name of the Court is now “African Court on Human and Peoples’ Rights.”

² Article IV.

³ Article 7.

⁴ Article 6.

⁵ Article 7(2).

⁶ Article 6(2).

⁷ Article 27.

⁸ Article 6(2).

⁹ Article 29(2).

¹⁰ Article 10(3).

indicted Slobodan Milosevic, President Omar al-Bashir¹¹, Muammar Gaddafi¹², and more recently, President Uhuru Kenyatta,¹³ refuting any claims of immunity which are prohibited under the Rome Statute. The argument that President Kenyatta should be excused from appearing in court because of his duties as head of state was rejected by a majority of the ICC chamber.¹⁴ Thus, the defense that the inclusion of immunity would impede the efficient workings of the state was defeated.

The Amendments Protocol also contravenes the African Charter on Human and Peoples' Rights. For example, Article 3(1) states that "Every individual shall be equal before the law." But creating a class of persons immune from prosecution for atrocity crimes by virtue of their political function necessarily means treating individuals as *unequal* before the law. Similarly, Article 3(2) states that "Every individual shall be entitled to equal protection of the law." But creating a class of persons who cannot be prosecuted for international crimes means that certain victims will not receive the full protection of the laws. Criminal laws are created in part to deter crimes and, where those crimes are committed, to ensure punishment for the criminals. But where a class of persons knows they will not be prosecuted as long as they remain in that class, the law will not deter them and therefore cannot protect victims of those crimes. In addition, the amendment departs from the AU's Constitutive Act, which expresses "condemnation and rejection of impunity".¹⁵

At a practical level, as former High Commissioner for Human Rights Navi Pillay has noted, granting blanket immunity for the commission of atrocity crimes fuels violence and destabilizes states and their regions.¹⁶ Accountability should not be tied to political power – rather it should be depoliticized, with decisions about whom to prosecute and when based solely on evidence of culpability. Moreover, granting immunity to sitting heads of state and similarly placed officials during their tenure in office will lead those committing grave abuses to cling to power to avoid prosecution – and perhaps to continue to commit atrocity crimes in order to retain power.

Granting immunity to any person who has committed atrocity crimes also does an injustice to the victims of those crimes. Numerous human rights conventions enshrine the rights of victims to redress for violations of human rights. For example, Article 2(3) of the International Covenant on Civil and Political Rights requires

¹¹ Max du Plessis, *Shambolic, shameful and symbolic, Implications of the African Union's immunity for African leaders*, Institute for Security Studies, November 2014, ps. 6 & 9, See www.issafrica.org/uploads/Paper278.pdf.

¹² Reuters, *ICC issues Gaddafi arrest warrant*, 28 June 2011, See <http://www.aljazeera.com/news/africa/2011/06/201162781481666670.html>.

¹³ *The Prosecutor v. Uhuru Mulgai Kenyatta*, ICC-01/09-02/11.

¹⁴ BBC News Africa, *ICC: Kenya President Uhuru Kenyatta must appear at Hague*, 1 October 2014, See www.bbc.com/news/world-africa-29437948.

¹⁵ Article 4(o).

¹⁶ Remarks at side event at the 26th session of the Human Rights Council, June 13, 2014 in Geneva, "National Accountability for Atrocity Crimes – a Human Rights Priority."

states parties to ensure that any person whose rights or freedoms are violated has “an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity”. It is noteworthy that the voices clamoring for head of state immunity for international crimes are the heads of state themselves. Victims of these crimes are *not* calling for immunity, but for justice for the harms they have experienced. It is these voices that should drive and mold our pursuit of accountability.

Because the Amendments Protocol contravenes consistent practice in international law, foundational documents of the AU, decreases the deterrence of laws prohibiting atrocity crimes while encouraging offending heads of state to cling to power to avoid prosecution, and ignores the voices of thousands of victims calling for justice, we respectfully request that Your Excellency take all necessary measures to remove the immunity amendment from the Amendments Protocol so that all persons, regardless of official capacity, can be prosecuted for committing atrocity crimes before the ACHPR.

Respectfully yours,

A handwritten signature in black ink, appearing to read "Debra L. Raskin". The signature is fluid and cursive, with the first name "Debra" being the most prominent part.

Debra L. Raskin

CC:

Professor Vincent Nmheille
Director, Legal Counsel of the African Union Commission

Honorable Kayitesi Zainabo Sylvie
Chairperson of the African Commission on Human and People's Rights

Honorable Commissioner Zeid Ra'ad Al Hussein
High Commissioner
Office of the United Nations High Commissioner for Human Rights (OHCHR)

Dr. Robert Eno
Registrar, African Court on Human and Peoples' Rights